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9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**
11 **WESTERN DIVISION**

12 FRANK JOSEPH CARDERELLA,) CASE NO. CV 09-8299 R (MANx)
13)
14 Plaintiff,) **MEMORANDUM OF POINTS AND**
15) **AUTHORITIES IN SUPPORT OF**
16 vs.) **MOTION FOR IMPOSITION OF**
17) **ISSUE-RELATED SANCTIONS/**
18 JANET NAPOLITANO, as Secretary) **EVIDENTIARY SANCTIONS**
19 of the Department of Homeland) **(ADVERSE INFERENCE**
20 Security) **SANCTION AND/OR SANCTION**
21) **DEEMING FACT ESTABLISHED**
22 Defendant.) **AND/OR EXCLUSIONARY**
23) **SANCTION)**
24)
25) Date: October 12, 2010
26) Time: 9:00 a.m.
27) Ctrm: Spring Street Courthouse
28) 312 North Spring Street, Ctrm 8
Los Angeles, California 90012
)
Trial Date: October 19, 2010
Time: 9:00 a.m.
Ctrm: Spring Street Courthouse
312 North Spring Street, Ctrm 8
Los Angeles, California 90012
)
Honorable Manuel L. Real

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I.INTRODUCTION

Plaintiff Frank Carderella has filed an action against Defendant for the INS' discrimination against Plaintiff in filling vacant DEO positions in violation of Title VII. To establish a *prima facie* case of disparate treatment in hiring under Title VII, a plaintiff must demonstrate: (1) he is a member of a protected class; (2) he applied for and was qualified for the position at issue; (3) he was denied employment, despite his qualifications; and (4) the position remained open and the INS sought other similarly-qualified individuals outside the plaintiff's protected class.

Defendant does not dispute that Plaintiff Carderella was a member of a protected class Carderella applied for and was qualified for the Detention Enforcement Officer ("DEO") position and Carderella was not selected for the DEO position despite his qualifications. Defendant does maintain, however, that Plaintiff cannot prove that another individual with similar qualifications outside Plaintiff's protected class of a white Catholic male was selected for the vacant DEO position because the records and files relating to the filling of said vacancy have been destroyed by Defendant. Moreover, those individuals who participated in the discriminating selection process don't have any specific recollection of what individuals were selected over Plaintiff for the DEO position.

Clearly, Plaintiff has been prejudiced by the destruction of said evidence in that the same is necessary to establish the alleged discrimination. Defendant, being in sole possession and control of these records, had both a legal and internal duty to preserve the records and files relevant to Plaintiff's alleged discrimination claim upon first receiving notice of the same on September 25, 1996. Yet, Defendant knowingly destroyed these relevant records and files.

Under such circumstances this court has the inherent power to issue certain

1 issue related and/or evidentiary sanctions including: (1) an adverse inference: (2)
 2 deeming the alleged fact of discrimination established; and/or (3) excluding any
 3 evidence Defendant offers to attempt to refute Plaintiff's discrimination claim.

4 For these reasons and those hereinafter set forth, this court may properly
 5 issue an adverse inference sanction that the destroyed evidence would have likely
 6 supported Plaintiff's discrimination claim. The court may also issue a sanction
 7 deeming the alleged discrimination established as a fact and a sanction excluding
 8 any evidence that Defendant attempts to offer to refute the alleged
 9 discrimination.

10 II.

11 STATEMENT OF RELEVANT UNDISPUTED FACTS

12 Plaintiff applied in November 1995 for a DEO position with the U.S.
 13 Immigrations and Naturalization Service ("INS"). At all relevant times, Plaintiff
 14 was qualified for the position of DEO. On September 15, 1996, the selecting
 15 officer did not select Plaintiff for the DEO position. On September 25, 1996,
 16 Plaintiff notified the INS that he believed the INS had discriminated against him
 17 on the basis of race, national origin, religion or sex. On January 29, 1997,
 18 Plaintiff timely filed a Complaint of discrimination (hereinafter "Complaint")
 19 with the U.S. Department of Justice-Immigration and Naturalization Service
 20 Office of Equal Employment Opportunity (hereinafter U.S. Justice Department").
 21 At the time Plaintiff notified the INS of the discrimination, the INS had a policy
 22 that upon notice of any claim for discrimination that the records and files relating
 23 to the alleged discrimination must be preserved. The INS and its affiliated
 24 departments, including Personnel Management also had as a matter of law an
 25 "uncompromising duty to preserve" what they knew or reasonably should have
 26 known would be relevant evidence in a pending action and likely future litigation
 27 regarding the same, even though no discovery request or order to preserve the
 28 evidence has yet been made. Despite Plaintiff's September 25, 1996 notification

of discrimination, Plaintiff's filing of the discrimination Complaint and the corresponding duty to preserve the records relevant to the same, the INS Office or Office of Personnel Management, who had sole possession and control of the records relevant to the filling of the vacant DEO position, destroyed the same allegedly in accordance with a purported two-year retention policy. As a consequence, Defendant currently has no records regarding the filling of the DEO position vacancy. As a result of the destruction of the records relating to the filling of the DEO position vacancy, Plaintiff has been deprived of the ability to prove the alleged discrimination and/or opportunities to establish additional favorable proof to the substantial prejudice of the Plaintiff. Moreover, none of the INS employee's privy to the subject alleged discriminatory selection process has a recollection of the same. (See Declarations of John A. Stillman, Frank Carderella and Request for Judicial Notice filed concurrently herewith.)

III.

LEGAL ARGUMENT

A. THIS COURT HAS THE INHERENT POWER TO REGULATE THE COURSE OF THE PROCEEDINGS BEFORE IT, INCLUDING THE POWER TO IMPOSE CERTAIN SANCTIONS FOR A PARTY'S FAILURE TO PRESERVE EVIDENCE

Absent a prior court order or statutory authority, this court has the inherent power to impose certain sanctions for spoliation of evidence. *Residential Funding Corp. v. DeGeorge Fin'l Corp* 306 F. 3d 99 (2nd Cir. 2002); *World Courier v. Barone*, No. C 06-3072 TEH, 2007 WL 1119196, at *1 (N.D.Cal. April 16, 2007); *In re Napster, Inc.*, 462 F.Supp.2d 1060, 1078 (N.D.Cal.2006); *Dong Ah Tire & Rubber Co., Ltd. v. Glasforms, Inc.*, C 06-3359 JF (RS), 2009 WL 1949124 (N.D. Cal. July 2, 2009) modified, C 06-3359 JF (RS), 2009 WL 2485556 (N.D. Cal. Aug. 12, 2009); *Bayoil, S.A. v. Polembros Shipping Ltd.* (SD

TX 2000) 196 FRD 479, 482; *Unigard Security Ins. Co. v. Lakewood Eng. & MFG. Corp.* (9th Cir. 1992) 982 F.2d 363, 365. It is the purpose, in part, of such sanctions to place the risk of associated with the destruction of evidence on the party who wrongfully created the risk and to restore the prejudiced party to the position he would have been in but for the spoliation. (*West v. Goodyear Tire & Rubber Co.* (2nd Cir. 1999) 167 F.3d 776, 779.)

Further, as the court noted in , *Realnetworks, Inc. v. DVD Copy Control Ass'n. Inc.*, 264 F.R.D. 517, 523-24 (N.D. Cal. 2009):

“A party's destruction of evidence need not be in “bad faith” to warrant a court's imposition of sanctions. *Glover*, 6 F.3d at 1329; *Unigard*, 982 F.2d at 368 n. 2. **District courts may impose sanctions against a party that merely had notice that the destroyed evidence was potentially relevant to litigation.** See *Glover*, 6 F.3d at 1329; *Akiona*, 938 F.2d at 161; cf. *Unigard*, 982 F.2d at 368 n. 2 (sanctions may be imposed for “willfulness or fault by the offending party”)....”

“As soon as a potential claim is identified, a litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action. *Nat'l Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543, 556-57 (N.D.Cal.1987) (Patel, J.); *Baliotis*, 870 F.Supp. at 1290; see also *Unigard*, 982 F.2d at 365, 369....” (Emphasis Added.)

Based on this court's inherent power to issue sanctions for spoliation of evidence, Frank Carderella respectfully seeks, as herein after set forth, issue-related sanctions consisting of an adverse inference sanction and/or a sanction that the alleged discrimination be deemed established as a fact for purpose of these proceedings and/or an evidentiary sanction that any evidence proffered by Defendant to refute the Plaintiff's discrimination claim be excluded.

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B. AS A RESULT OF DEFENDANT'S SPOILIATION OF EVIDENCE, AN ADVERSE INFERENCE SANCTION FOR DEFENDANT'S FAILURE TO PRESERVE RELEVANT EVIDENCE RELATING TO DEFENDANT'S ALLEGED DISCRIMINATION OF PLAINTIFF IS PROPER

The facts are undisputed that the INS destroyed the records and files relevant to its alleged discrimination of Plaintiff in connection with the filling of vacant DEO position. This destruction of evidence occurred after the INS had received notice of Plaintiff's claim of discrimination and despite its internal policy that such records should be preserved upon notice of a claim of discrimination relating to the same.

Under such circumstances, this court has the inherent power to impose an adverse inference sanction against Defendant for spoliation of evidence. In this regard, the district courts' inherent power to sanction may be invoked in response to destruction of evidence. If, as herein, the defendant breaches its duty to preserve evidence, the plaintiff may move the court to sanction the party destroying evidence in the form of an adverse inference. *See Unigard Security Ins. Co. v. Lakewood Eng. & MFG. Corp.* (9th Cir. 1992) 982 F2d 363, 365 wherein the court noted in relevant part:

"... (a) court can instruct the jury that it may draw an inference adverse to the party or witness responsible for destroying the evidence. *See Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993); *Akiona v. United States*, 938 F.2d 158, 161 (9th Cir. 1991), *cert. denied*, 503 U.S. 962 (1992)."

Frank Carderella has filed a claim for discrimination against the INS in connection with the INS' selection of an individual outside Plaintiff's protected class with similar qualifications for the vacant DEO position.

To establish a *prima facie* case of disparate treatment in hiring under Title VII, a Plaintiff must demonstrate: (1) he is a member of a protected class; (2) he

1 applied for and was qualified for the position at issue; (3) he was denied
 2 employment, despite his qualifications; and (4) the position remained open and
 3 the INS sought other similarly-qualified individuals outside the plaintiff's
 4 protected class. *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802
 5 Defendant does not dispute that Plaintiff satisfies the first three *McDonnell*
 6 criteria to establish discrimination (i.e. Carderella was a member of a protected
 7 class, Carderella applied for and was qualified for the DEO position and
 8 Carderella was not selected for the DEO position despite his qualifications.) As
 9 to the fourth element, Carderella respectfully submits that an adverse inference is
 10 proper based on the INS' spoliation. In this regard, the records and files
 11 destroyed by the INS would have supported the fourth *McDonnell* requirement
 12 that after the INS refused to select Plaintiff for the DEO position, said position
 13 remained open and another individual similarly qualified outside Carderella's
 14 protected class was selected thereby establishing a *prima facie* case of disparate
 15 treatment in hiring under Title VII.

16 In *Residential Funding Corp. v. Degeorge Fin. Corp.*, 306 F.3d 99, 107
 17 (2d Cir.2002) the Second Circuit proscribed a three-part test for determining the
 18 propriety of an adverse inference. Several district courts in California have used
 19 the Second Circuit's three-part test set forth in *Residential Funding Corp. v.*
 20 *Degeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir.2002), to determine whether an
 21 adverse inference instruction is appropriate for spoliation. *See, e.g., World*
 22 *Courier v. Barone*, No. C 06-3072 TEH, 2007 WL 1119196, at *1 (N.D.Cal.
 23 April 16, 2007). *In re Napster, Inc.*, 462 F.Supp.2d 1060, 1078 (N.D.Cal.2006).
 24 The three-part test requires that the party seeking an adverse inference instruction
 25 establish that: (1) the party having control over the evidence had an obligation to
 26 preserve it; (2) the records were destroyed with a culpable state of mind; and (3)
 27 the destroyed evidence was relevant to the party's claim or defense.
 28

1 As to the first element, litigants have an “uncompromising duty to
 2 preserve” what they knew or reasonably should have known would be relevant
 3 evidence in a pending action and likely future litigation regarding the same, even
 4 though no discovery request or order to preserve the evidence has yet been made.
 5 Violation of this duty is known as “spoliation.” (See *Sensonics, Inc. v. Aerosonic*
 6 *Corp.* (Fed.Cir. 1996) 81 F.3d 1566, 1575; see also *Kronisch v. United States* (2nd
 7 Cir. 1998) 150 F.3d 112, 130.)

8 The “culpable state of mind” factor is satisfied by a showing that the
 9 evidence was destroyed “knowingly, even if without intent to [breach a duty to
 10 preserve it], or negligently.” *Byrnie v. Town of Cromwell*, 243 F.3d 93, 107-12
 11 (2d Cir.2001) (emphasis added).” (*Id.* 109)

12 With respect to the requirement of establishing the relevancy of the
 13 destroyed records, the court in *Residential* noted in this regard, that:

14 “...the party seeking an adverse inference must adduce sufficient
 15 evidence from which a reasonable trier of fact could infer that ‘the
 16 destroyed [or unavailable] evidence would have been of the nature
 17 alleged by the party affected by its destruction.’ *Kronisch*, 150 F.3d at
 18 127; *Byrnie*, 243 F.3d at 110. **Courts must take care not to ‘hold[]**
 19 **the prejudiced party to too strict a standard of proof regarding**
 20 **the likely contents of the destroyed [or unavailable] evidence,’**
 21 **because doing so ‘would subvert the ... purposes of the adverse**
 22 **inference, and would allow parties who have ... destroyed evidence**
 23 **to profit from that destruction.’ *Kronisch*, 150 F.3d at 128; *Byrnie*,**
 24 **243 F.3d at 110.**

25 Where a party destroys evidence in bad faith, that bad faith alone is
 26 sufficient circumstantial evidence from which a reasonable fact finder
 27 could conclude that the missing evidence was unfavorable to that
 28 party. See, e.g., *Kronisch*, 150 F.3d at 126 (**‘It is a well-established**
and long-standing principle of law that a party's intentional
destruction of evidence relevant to proof of an issue at trial can
support an inference that the evidence would have been
unfavorable to the party responsible for its destruction.’).
 Similarly, a showing of gross negligence in the destruction or

1 untimely production of evidence will in some circumstances suffice,
 2 standing alone, to support a finding that the evidence was unfavorable
 3 to the grossly negligent party. *See Reilly*, 181 F.3d at 267-68.
 4 Accordingly, where a party seeking an adverse inference adduces
 5 evidence that its opponent destroyed potential evidence (or otherwise
 6 rendered it unavailable) in bad faith or through gross negligence
 7 (satisfying the “culpable state of mind” factor), **that same evidence of**
 8 **the opponent's state of mind will frequently also be sufficient to**
 9 **permit a jury to conclude that the missing evidence is favorable to**
 10 **the party (satisfying the ‘relevance’ factor).”** (Emphasis Added.)

11 The court in *Residential* held that said adverse inference is even available
 12 in circumstances of negligent destruction of evidence, noting in pertinent part:

13 “The sanction of an adverse inference may be appropriate in some
 14 cases involving the negligent destruction of evidence because each
 15 party should bear the risk of its own negligence. As Magistrate Judge
 16 James C. Francis, IV aptly put it; [The] sanction [of an adverse
 17 inference] should be available even for the negligent destruction of
 18 documents if that is necessary to further the remedial purpose of the
 19 inference. It makes little difference to the party victimized by the
 20 destruction of evidence whether that act was done willfully or
 21 negligently. **The adverse inference provides the necessary**
 22 **mechanism for restoring the evidentiary balance. The inference is**
 23 **adverse to the destroyer not because of any finding of moral**
 24 **culpability, but because the risk that the evidence would have**
 25 **been detrimental rather than favorable should fall on the party**
 26 **responsible for its loss.** *Turner v. Hudson Transit Lines, Inc.*, 142
 27 F.R.D. 68, 75 (S.D.N.Y.1991). *See generally Kronisch v. United*
 28 *States*, 150 F.3d 112, 126 (2d Cir.1998) (stating that an adverse
 inference instruction serves the remedial purpose, “insofar as possible,
 of restoring the prejudiced party to the same position he would have
 been in absent the wrongful destruction of evidence by the opposing
 party”).” (Emphasis Added.)

29 *In re Napster, Inc.*, 462 F.Supp.2d 1060, 1078 (N.D.Cal.2006) *supra* the
 30 court relied on the *Residential* three-part test to justify the application of an
 31 adverse inference, “Hummer deleted Napster-related communications which it

1 had a duty to preserve, knowing that such a duty existed. Hummer's conduct
 2 amounts to gross negligence, if not willfulness, which is sufficient culpability to
 3 justify an adverse inference.”

4 In *World Courier v. Barone*, C 06-3072 TEH, 2007 WL 1119196 (N.D.
 5 Cal. Apr. 16, 2007) the court also relied on the *Residential* factors in applying an
 6 adverse inference.

7
 8 “Here, Plaintiff has satisfied each of these elements. First, Defendant
 9 Barone was on notice of the potential relevance of the evidence to the
 10 instant litigation as early as May 8, 2006, prior to the destruction of
 11 the hard drive, when she spoke with Marken's counsel regarding the
 12 ACT database. Decl. of Turner P. Smith, Ex. F, D. Barone Tr. 9-10.
 13 Indeed, Defendant Barone acknowledged that she knew that she
 14 should not destroy any documents or data that may be relevant to the
 15 lawsuit. *Id.* at 22-23. Second, the “mental culpability” factor is
 16 satisfied where the party acted “knowingly or ... negligently.”
 17 *Residential Funding Corp.*, 306 F.3d at 108 (quoting *Byrnie v. Town*
 18 *of Cromwell*, 243 F.3d 93, 109 (2d Cir.2001)). Here, the evidence
 19 indicates that Doneen was at least negligent and more likely
 20 knowingly willful, in failing to prevent the spoliation of relevant
 21 evidence by her husband. Third, the hard drive was relevant because it
 22 contained a copy of the ACT database, the very data that forms the
 23 basis for Plaintiff's claim of misappropriation of trade secrets.
 24 Accordingly, the Court concludes that an adverse inference instruction
 25 would be appropriate in this case.”

26 The imposition by this court of an adverse inference in the form of a jury
 27 instruction or otherwise, is appropriate under the three-part test utilized by the
 28 court in *Residential*. First, Defendant having been put on notice of the
 discrimination claim and the reasonable probability of litigation relating to the
 same, had both a legal and internal duty to preserve the evidence at the time it
 was destroyed. Second, the record's were destroyed with a “culpable state of
 mind” because the INS admits it knowingly destroyed the records allegedly in
 accordance with a purported two-year retention policy – this despite its own

1 internal policy to preserve said evidence upon notice of a discrimination claim
 2 related to the same. Further, the destroyed evidence is relevant to Plaintiff's claim
 3 of discrimination based on the same evidence that is necessary to establish the
 4 culpable state of mind of defendant discussed *supra*. Finally, "...**whether or not**
 5 **there is a business justification for destroying documents, it is sanctionable**
 6 to destroy documents when a party 'is on notice that documents and information
 7 in its possession are relevant to litigation, or potential litigation, or are reasonably
 8 calculated to lead to the discovery of admissible evidence.'" (*ABC Home health*
 9 *Serv. Inc. v. IBM Corp.* (S.D. Ga. 1994) 158 F.R.D. 180, 182 quoting *William T.*
 10 *Thompson v. General Nutrition Corp.* (C.D. Cal. 1984) 593 F. Supp. 1443, 1455.)
 11 (Emphasis Added.)

12 The court in *Dong Ah Tire & Rubber Co., Ltd. v. Glasforms, Inc.*, C 06-
 13 3359 JF (RS), 2009 WL 1949124 (N.D. Cal. July 2, 2009) modified, C 06-3359
 14 JF (RS), 2009 WL 2485556 (N.D. Cal. Aug. 12, 2009), applied other factors in
 15 determining the propriety of an adverse inference, specifically, an adverse
 16 inference "is appropriate if spoliation of evidence occurs where: (1) the evidence
 17 is destroyed after a party receives some notice that the material was potentially
 18 relevant to the litigation; and (2) prejudice to the opposing party ensues."
 19 However, "[o]nly a "minimum link of relevance" is required to permit the use of
 20 an adverse inference instruction. *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th
 21 Cir. 1993)" (Id.)

22 In so holding, the court in *Dong* acknowledged that several district courts
 23 in California have used the Second Circuit's three-part test as set forth in
 24 *Residential Funding Corp. v. Degeorge Fin. Corp.*, 306 F.3d 99, 107 (2d
 25 Cir.2002), to determine whether an adverse inference instruction is appropriate
 26 for spoliation, citing *World Courier v. Barone*, No. C 06-3072 TEH, 2007 WL
 27 1119196, at *1 (N.D.Cal. April 16, 2007 and *In re Napster, Inc.*, 462 F.Supp.2d
 28 1060, 1078 (N.D.Cal.2006) *supra*).

1 *Dong* also recognized, “in the Ninth Circuit, spoliation of evidence raises a
 2 presumption that the destroyed evidence goes to the merits of the case, and
 3 further, that such evidence was adverse to the party that destroyed it” citing.
 4 *Phoceene Sous-Marine, S.A. v. U.S. Phosmarine, Inc.*, 682 F.2d 802, 806 (9th
 5 Cir.1982); see *Nat'l Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543,
 6 557 (N.D.Cal.1987) (“Where one party wrongfully denies another the evidence
 7 necessary to establish a fact in dispute, the court must draw the strongest
 8 allowable inferences in favor of the aggrieved party.”).

9 The court found in *Dong*,

10 “Taishan's destruction of evidence is not in dispute, thereby
 11 precluding Glasforms from any opportunity to inspect the materials.
 12 Indeed, many records from exactly the time frame when the fiberglass
 13 at issue was manufactured, the very evidence that a jury could be
 14 expected to weigh in determining the source of any contamination,
 15 has been destroyed. The disappearance of the graphite rollers, for
 16 example, renders a reliable determination of the cause of the
 17 contamination difficult. As noted above, given such conduct, it is
 18 within the Court's discretion to determine that an adverse inference
 19 instruction is warranted to cure the prejudice arising in the context of
 20 this case. (Citations omitted.).Taishan's refusal to preserve evidence
 21 supports the “common sense proposition” that those communications
 22 were unhelpful to its case. The Court finds that Taishan's failure to
 23 preserve documents after litigation was anticipated, and its failure to
 24 comply with its own document retention policy, warrants adverse
 25 inference jury instructions for the materials identified above.”

26 In applying the factors in *Dong*, the Defendant herein does not dispute that
 27 the records and files relevant to the filling of the DEO vacancy were knowingly
 28 destroyed by the INS after notice of Plaintiff's discrimination claim. As a result,
 it acknowledges it has no documents relating to the filling of the vacant DEO
 position. Further, the INS individuals who participated in the ultimate selection
 for the subject DEO positions have no specific recollection regarding the same.

1 Consequently, Carderella is left in a position of being unable to show by direct
 2 evidence and/or even circumstantial evidence the INS' discrimination in not
 3 selecting Carderella for one of the vacant DEO positions. Certainly, as in *Dong*,
 4 the Plaintiff herein has been unfairly prejudiced by the INS' failure to maintain
 5 the records pertaining to the filling of the DEO vacancy. Under *Dong* an adverse
 6 inference that the destroyed records would have supported Plaintiff's
 7 discrimination claim is therefore appropriate because 1) the evidence was
 8 destroyed after the September 25, 1996 notice of discrimination and the filing of
 9 the Complaint which put the INS on notice that any records relating to the
 10 announcement of the vacancy and filling the vacancy was potentially relevant to
 11 Carderella's discrimination claim and any future litigation which was likely to
 12 result if his administrative Complaint failed to result in the prayed for redress;
 13 and 2) prejudice to Carderella has obviously ensued.

14 Finally, in *Nat'l Ass'n of Radiation Survivors v. Turnage*, 115 F.R.D. 543,
 15 557 (N.D. Cal. 1987) the court noted in applying an adverse inference, "**Needless**
 16 **to say, plaintiffs should not suffer because of this. Where one party**
 17 **wrongfully denies another the evidence necessary to establish a fact in**
 18 **dispute, the court must draw the strongest allowable inferences in favor of**
 19 **the aggrieved party.** (Citations omitted.) As the court in *Alexander v. National*
 20 *Farmers Org.*, 687 F.2d 1173 (8th Cir.1982), *cert. denied*, 461 U.S. 937, 938,
 21 103 S.Ct. 2108, 2110, 77 L.Ed.2d 313, 314 (1983), observed, [o]bviously, the
 22 **relevance of and resulting prejudice from destruction of documents cannot**
 23 **be clearly ascertained because the documents no longer exist. Under the**
 24 **circumstances, [the culpable party] can hardly assert any presumption of**
 25 **irrelevance as to the destroyed documents...**" (Emphasis Added.)

26 Thus, whether this court applies the test set forth in *Residential* or the
 27 factors relied on by the court in *Dong*, an adverse inference is properly applied in
 28

1 these proceedings that the destroyed evidence would have supported Plaintiff's
2 discrimination claim.

3 **C. AS A RESULT OF DEFENDANT'S SPOLIATION OF**
4 **EVIDENCE, AN ISSUE-RELATED SANCTION DEEMING**
5 **THE ALLEGED DISCRIMINATION ESTABLISHED IS**
6 **PROPER**

7 Frank Carderella further seeks for Defendant's spoliation of evidence an
8 issue-related sanction deeming the alleged discrimination of Plaintiff established
9 for purposes of these proceedings. "Under its inherent power, a Court may
10 impose the sanctions of striking a defense or deeming a fact as established when
11 a 'preponderance of the evidence establishes that a party's misconduct has tainted
12 the evidentiary resolution of the issue.'" (See *Bayoil , S.A. v. Polembros*
13 *Shipping Ltd.* supra 196 FRD at 482 quoting *Shepard v. American Broad Co.,*
14 *Inc.* (D.C. Cir. 1995) 62 F.3d 1469, 1478) Accordingly, a sanction deeming the
15 Defendant's alleged discrimination established as follows is proper:

16 " Defendant denied an employment opportunity to Plaintiff when on
17 September 15, 1996, Plaintiff was not selected, despite his
18 qualifications, for the position of Detention Enforcement Officer, GS-
19 7 because of Plaintiff's race (white), sex (male), religion (Catholic)
and national origin (Italian)."

20 **D. AS A RESULT OF DEFENDANT'S SPOLIATION OF THE**
21 **EVIDENCE, AN EVIDENTIARY SANCTION EXCLUDING**
22 **ANY EVIDENCE DEFENDANT OFFERS TO REFUTE THE**
23 **ALLEGED DISCRIMINATION IS PROPER**

24 The Plaintiff also seeks based on Defendant's spoliation of this critical
25 evidence an evidentiary sanction to exclude any evidence that the Defendant
26 attempts to introduce to refute the alleged discrimination. "The district courts'
27 inherent power to sanction may be invoked in response to destruction of
28 evidence. If a [defendant] breaches its duty to preserve evidence, the [plaintiff]

1 may move the court to sanction the party destroying evidence.” *See Unigard*, 982
 2 F.2d at 365.

3 See also *Toste v. Lewis Controls, Inc.*, C-95-01366-MHP, 1996 WL
 4 101189 (N.D. Cal. Feb. 27, 1996) wherein the court noted in this regard in citing
 5 *Unigard*

6 “District courts may impose sanctions as part of their inherent power
 7 “to manage their own affairs so as to achieve the orderly and
 8 expeditious disposition of cases.” *Chambers v. NASCO, Inc.*, 501 U.S.
 9 32, 43, *reh'g denied*, 501 U.S. 1269 (1991); *see also Unigard Sec. Ins.*
 10 *Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir.
 11 1992) (excluding evidence as a sanction for spoliation). This power
 12 includes the “broad discretion to make ... evidentiary rulings
 13 conducive to the conduct of a fair and orderly trial.” *Id.* at 368
 14 (quoting *Campbell Indus. v. M/V Gemini*, 619 F.2d 24, 27 (9th Cir.
 15 1980)).”

16 Based on Defendant’s spoliation of the evidence, an evidentiary sanction
 17 excluding any evidence Defendant may offer to refute Plaintiff’s claim for
 18 discrimination is proper.

19 IV.

20 CONCLUSION

21 Plaintiff has established that Defendant being in sole possession and
 22 control of the records and files relating to the alleged discriminatory selection for
 23 the vacant DEO position had a duty to preserve the same because it had been
 24 notified of Plaintiff’s discrimination claim. Yet, Defendant destroyed these
 25 records and files purportedly pursuant to a two year retention program. Whether
 26 or not there is a business justification for destroying documents, it is sanctionable
 27 to destroy documents when a party is on notice that documents and information
 28 in its possession are relevant to litigation, or potential litigation, or are reasonably
 calculated to lead to the discovery of admissible evidence Based on the spoliation

1 of evidence, this court may properly exercise its inherent power to impose the
2 requested issue-related and evidentiary sanctions.

3 Dated: September 10, 2010 Respectfully submitted,

4
5 GOOD, WILDMAN, HEGNESS & WALLEY

6
7 By:

8 John A. Stillman, Attorneys for Plaintiff,
9 Frank Joseph Carderella
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